Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-39

MEMPHIS LIGHT, GAS AND WATER DIVISION; CALVIN HENZE, HENRY T. WINKELMAN, ELIOT WHITTINGTON, ROBERT S. BOWERS and PATRICIA SHAW, Commissioners, Petitioners,

V.

WILLIE S. CRAFT and MARY CRAFT, MS. IDA BELL HOLMES, MS. ANNA SUE FUNZIE, MS. SARA PARKS, Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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No.

MEMPHIS LIGHT, GAS & WATER DIVISION, et at., Petitioners,

V.

WILLIE S. CRAFT, et al., Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

The petitioners Memphis Light, Gas and Water Division, Calvin Henze, Henry T. Winkelman, Eliot Whittington, Robert S. Bowers and Patricia Shaw respectfully pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit filed April 12, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is printed as Appendix "A." The opinion of the District Court for the Western District of Tennessee was not reported but is printed as Appendix "B."

JURISDICTION

The opinion of the Sixth Circuit was filed on April 12, 1976.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Is utility service, including utility service without payment of charges, a property right which is protected by the Due Process clause of the Fourteenth Amendment?

2. Assuming utility service is "property," must there be a prehearing termination procedure before cutoff or is the termination procedure of the Memphis Light, Gas and Water Division a constitutionally sufficient procedure meeting the minimum requirements of due process of law?

3. Are the cutoff policies of the Memphis Light, Gas and Water Division, a municipally owned utility, which operates in a proprietary capacity without governmental immunity but on a nonprofit basis, subject to the provisions of the Fourteenth Amendment requirements of due process?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourteenth Amendment to the United States Constitution and of the Charter of the City of Memphis are set forth in Appendix "C" hereto.

STATEMENT OF THE CASE

History of the Litigation.

The plaintiffs as customers of the Memphis Light, Gas and Water Division filed suit alleging that utility services had been terminated without due process of law as required by the Fourteenth Amendment. The plaintiffs filed suit on their own behalf and as a class. The District Court Judge suggested and the Memphis Light, Gas and Water Division agreed not to terminate the utility services of the named plaintiffs pending the trial on the merits so long as regular payments for current uses of utilities were made. Any arrearage would not be paid pending the outcome of the suit. The Trial Judge held that the cause was not a proper class action and the Sixth Circuit agreed.

The Trial Judge held that the Memphis Light, Gas and Water Division had not violated any of the plaintiffs' rights to due process of law although the District Court suggested but did not require that the defendants change the notices of termination to provide more specific information about customer service location and personnel available to work out extended payment plans or adjustments of accounts in genuine hardship or appropriate situations.

The Sixth Circuit affirmed that no class action was applicable but held that utility service was a property right entitled to due process. The Sixth Circuit Court of Appeals held that the shutoff notice was constitutionally insufficient to advise of the steps to settle *disputes* and further there was no constitutionally sufficiency hearing procedures established by the Memphis Light, Gas and Water Division.

The Sixth Circuit held that the "final notice" was sufficient for a customer with an admitted inability to pay and for which credit counselor for assistance and utility payment plans were available. No review is sought on this holding.

The Sixth Circuit also held that plaintiff Holmes was correct and Memphis Light, Gas and Water Division was in error to refuse to initiate service to her because of past due bills of her common law husband. No certiorari is requested concerning this phase of the case but is limited to the question of property rights, state action and due process.

Organization of Memphis Light, Gas and Water Division

The Memphis Light, Gas and Water Division was created by an amendment to the Charter of the City of Memphis. The president is appointed by the Mayor and approved by the City Council and required to devote his full time to the management of utility services. Four other citizen members are appointed to the Board of Commissioners by the Mayor and approved by the City Council.

The Memphis Light, Gas and Water Division is to operate on a non-profit basis and was established for the purpose of providing low utility rates to the City of Memphis. (Appendix "C".) The revenue received each year from the operation of the Division is used to pay operating expenses, capital improvements, reserves and payment in lieu of taxes with any surplus required by the Charter to be devoted solely to rate reduction.

The Memphis Light, Gas and Water Division, hereinafter referred to as the "Division" is in the service area for electricity of the Tennessee Valley Authority whose rates the General Accounting Office report are approximately forty-five percent (45%) lower on an average than are power rates in the rest of the United States. The Division has approximately 235,000 residential consumers of electricity, 200,000 residential consumers of gas and 165,000 residential consumers of water. Some multiple dwellings have only one meter for water whereas there are individual meters for electricity or gas to the customers.

Billing Procedures in Question

A new or slow pay customer of the Division may have approximately sixty-five (65) days of service without payment before there is a termination.

The service area of the Division is divided into twenty-one (21) cycles representing the approximate number of working days per month. Each cycle of meters is read on a rotating basis throughout the month and all meters are read every month except for unusual circumstances.

The bill is mailed approximately four (4) days after the meter reading date.

A second bill or final notice which includes a flyer concerning certain information about payment or budget payments is thereafter mailed. If no payment is received, one service is terminated and if no further payment is made within seven (7) days, then the remaining two services are terminated.

During a six (6) month period as shown by the interrogatories from September, 1973 through February,

1974, approximately 106,000 final notices were sent out to customers, both residential and commercial. This is approximately 17,000 notices per month. During this six-month period, there were approximately 12,000 one service terminations or 2,000 per month. Eighty-eight percent (88%) of the customers receiving a final notice either paid or made arrangement through the extended payment or credit plan and eleven percent (11%) received termination.

A new customer or a customer with a history of slow pay or other credit activity can receive service for approximately sixty-five (65) days before termination of his utilities. An example was given by written exhibits assuming the beginning of a cycle on January 2 of the year. (See Appendix "D.") A customer with service beginning on January 2 would have his meter read on January 31 and the bill would be mailed (depending on the weekend) four (4) to six (6) days later. The last day to pay the net amount would be February 20 or approximately twenty (20) days after the meter reading. The original bill spells out the last day to pay the net amount. On February 25 or five (5) days after the last day to pay the net amount, if the Division has not received payment from the customer, then he will receive the red or final notice in an envelope. The red bill is enclosed in an envelope to assure the privacy of this individual. On the red bill or final notice it gives a specific date that the services will be terminated.

Included with this red bill or final notice is a stuffer or flyer which may have on the bill (depending upon the location of the customer) when and where credit counselors will be available at a branch office either in north Memphis or south Memphis. It appears as stated by the Sixth Circuit that the flyer to the north and south

Memphis area where there were credit problems stated that if you were having difficulty paying your utility bill you would bring the bill to the neighborhood credit counselors for assistance as well as coming to the main office. The other flyer going to other areas stated:

> "If you are having difficulty paying your utility bill and would like to discuss a utility payment plan, or if there is *any dispute* concerning the amount due, bring your bill to the office at 220 South Main, Monday through Friday, or phone 527-0311."

There are approximately thirty-five (35) to forty (40) employees in the information center who receive telephone calls, including telephone calls concerning requests for extensions for payment of bills.

These employees are authorized to grant up to three (3) days extension for the payment of bills which would bring the person within one (1) day of the next meter reading cycle by the meter reader. Upon contact these service advisors can instantly void a cutoff order through access to the computer located at their desk.

Upon receipt of a final notice including the information in the stuffer or flyer, the next step is for the customer to contact the credit office. If the customer does not contact the Division, the next step is for the meter reader to disconnect one service as of March 1.

The meter reader is instructed to knock on the door and to make every attempt to get someone to the door. If no response, then a green tag is left at the door that is the most obviously used for entrance to the premises. The language of the door knocker card is that it is a disconnect service order (DSO) and that the Division

would be pleased to reconnect the service later today if the card and the red final notice is taken to the nearest store accepting utility payments or to the main office to pay the bill. If this is done before 4:00 P.M. then customer service may be called and upon showing of the receipt when the service man arrives, the service will be connected. If after 4:00 P.M. the service man may not get to the home until the next working day.

If the meter reader contacts the customer and the customer claims someone in the house is sick and the meter reader is so convinced, then no cutoff will be made. If the customer states he has mailed a check or money order, the meter reader is to question him as to when mailed and the amount, but to leave all services on. If there are indications that the customer has been absent for a period of time, possibly on vacation, no cutoff is made and the ticket is marked "vacation." If a customer has a paid receipt then no cutoff is made.

If a customer has not paid the bill then the door-knocker card is filled out and left with the instructions above. If the customer has received an extension either over the telephone or "passed" by the meter reader and no payment or arrangement has been made within three (3) days, then a customer service man will be dispatched on March 7 or approximately five (5) days later and all services will be terminated.

The customer therefore has had approximately sixty-five (65) days of service without payment, having received a bill giving date to pay, a final notice with a leaflet advising him to contact the neighborhood credit office or to come to the Division for credit arrangements or in some possible instances to "discuss disputes." Further, there was a personal contact or an attempted

personal contact by the meter reader before any service was terminated.

The Sixth Circuit did not attack the extended payment plan and credit counselors of the Division but only that no procedure was open for discussions on disputes.

The record further indicated that if a customer complained about the amount of his bill being too high, an investigation of his meter was made upon request and cutoff procedure delayed.

The issue concerning the dispute between the Division and Mr. and Mrs. Craft arose when the Craft's purchased a house which had two (2) meters for providing gas and electric service. The residence had in fact previously been used as a duplex. The Craft's received split billing, that is each meter registered the gas and electricity used in a particular portion of the house. The matter was further complicated because the Craft's were advised to have one of the meters removed and the electrician removed the electric meter from one account and the plumber removed the gas meter from the other account so that the Craft's continued to receive two bills because of the mistakes of the independent contractors which was later rectified by combining the accounts.

REASONS FOR GRANTING THE WRIT

1. THERE IS A CONFLICT BETWEEN THE SIXTH CIRCUIT COURT OF APPEALS AND THE TENNESSEE SUPREME COURT THAT WATER OR UTILITY SERVICE IS A PROPERTY RIGHT.

The Tennessee Supreme Court in *Patterson v. City of*

Chattanooga, 192 Tenn. 267, 241 S.W.2d 291, was considering the question of whether or not the water company may discontinue the water service for the refusal of the property owner to pay the sewer service charge. The Court asked the question of whether the discontinuance of the water service deprived the owner of *property* or *property rights* in violation of the Tennessee Constitution or the United States Constitution. It held that the general rule is that those furnishing the general public with its water supply, either in a private or a *municipal capacity*, may adopt, as a reasonable regulation for conducting said business, a rule providing that the water so furnished may be cut off for nonpayment therefor; and in pursuance of such regulation the water supply may be discontinued on the failure of the consumer to pay the water rate. The Supreme Court further held that it was a reasonable rule to allow disconnection of the water for failure to pay the sewer fees. The Tennessee Supreme Court has therefore held that the discontinuance of water for failure to pay water rates or sewer rates is not the deprivation of property or property rights.

The Tennessee Supreme Court determined as early as 1902 that a person has no property right to utility services without payment. *Jones v. Nashville*, 109 Tenn. 550. The Tennessee Supreme Court, in construing an ordinance setting up rules and regulations for principal water services, stated as follows:

> "Every inhabitant of the city is secured a continuous supply of water by complying with its provisions, and any of them, regardless of their circumstances in life, will be refused water upon their failure to observe them. Its execution is certain and nothing is left to the discretion or caprice of the officers of the defendant. It is just, in that it provides that all the inhabitants of the city shall pay their proper proportions of the expense of this almost indispensable public service. It is plain and unambigous in its terms and all parties are informed by it upon what terms they will be supplied with water, and under what circumstances and when the supply will cease."
>
> 109 Tenn. at 560.

Tennessee is reasonable in its regulations. In *Farmer v. Nashville*, 127 Tenn. 509, the Tennessee Supreme Court followed the reasonable rule that although water or utilities may be denied for failure to obey rules such as payment of charges this cannot be applied to require a tenant to pay water charges of a delinquent owner in order to secure services. Our Tennessee Supreme Court found that a requirement to deal only with landhold owners and refusal to run accounts or furnish water to tenants would be discrimination and the utility could not discriminate between inhabitants who own property and those who do not. This is similar to the holding in *Davis v. Weir*, 497 F.2d 139 (5th Cir. 1974).

The Memphis Light, Gas and Water Division is a nonprofit organization. As shown by the Charter, its rates are to be set to pay reasonable expenses and to operate on a nonprofit basis. After the payment of the purchase price of electricity or gas or the cost of pumping water, reserve payments in lieu of taxes, and similar necessary expenses, any surplus funds are to be used for the reduction of rates.

The Charter also contains the provision that the Board of Commissioners of the Memphis Light, Gas and Water Division shall make rules and regulations for carrying out the provisions.

The Memphis Light, Gas and Water Division is required, as a municipal utility, to have nondiscriminatory rules and regulations. It must have reasonable rates which do not discriminate between customers; it must offer its services to all with certain exceptions such as the payment of reasonable cost for extensions.

The Division, like a private utility, has tort liability and may be required to pay damages to its customers if it deprived them of services improperly.

The duty of the Division is to avoid bad debts if possible. It established a budget plan and the Sixth Circuit found that such plan was sufficient and provided proper notice and consultation with credit counselors.

The record does not show any failure to connect services at new addresses under different names. In fact, the testimony in this record indicated that Mrs. Parks or Mrs. Holmes both had utilities connected in their sons' names while they owed for delinquent services although they were the real party in interest and receiving benefit of the utility.

No evidence supports any allegation that a customer did not have an opportunity for a hearing by a trained credit counselor with access to supervisors. Whether the notice said contact a credit counselor or whether the notice did or did not mention disputes, the enclosure in the final notice notifies the customer to contact the Division.

The records do not show any insensitivity to large numbers of customers or an insensitivity to customers' need for extension of credit. In fact the record shows that on a complaint of a high bill, 33,000 meters were reread during the year to verify services.

The holding, therefore, that the entitlement to utility services is property requiring a pretermination hearing as well as additional requirements of notice is contrary to the decisions of the Tennessee Supreme Court.

2. THERE IS A CONFLICT OF DECISIONS OF THE UNITED STATES COURT OF APPEALS ON WHETHER OR NOT UTILITY SERVICES CONSTITUTE PROPERTY WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT.

This Court reserved the question of whether the utility services were property in deciding *Jackson vs. Metropolitan Edison Company*, 419 U.S. 345, 95 Sup. Ct. 449, 42 L. Ed. 2d 477. The Third Circuit, however, in its decision reported at 483 F. 2d 754, found that the right to electric services was not property. In a recent case of *Koger v. Guarino*, the District Court for the Eastern District of Pennsylvania distinguished *Jackson v. Metropolitan Edison Company*, supra; by stating that it applied to electric service but that water service was a property right. 44 *Law Week* 2528. The Fifth Circuit in *Davis v. Weir*, 497 F. 2d 139 (1974), and various District Court decisions within Circuits have held that utility services are property and are cited in the Opinion of the Sixth Circuit. In addition to the *Jackson* case, *Lucus v. Wisconsin Electric Power Company*, 466 F. 2d 638, also implies that utility services is not property (7th Cir.). In order to eliminate conflicting decisions within the Circuits, a writ of certiorari should be granted in order to resolve the conflict and this important question.

3. THE ISSUES OF WHETHER UTILITY SERVICES ARE PROPERTY AND, IF PROPERTY, WHAT PROCEDURAL DUE PROCESS AND EQUAL

PROTECTION IS NECESSARY ARE ISSUES OF NATIONAL IMPORTANCE.

The Memphis Light, Gas and Water Division is a municipally owned utility. According to the American Public Power Association, there are over 1,400 municipally owned electric power companies belonging to that organization. In addition, there are numerous municipal water companies so that a determination that the operation of the electric or water system is state action and that utility services are property is of significant importance to these utilities and their customers.

The costs of energy has been rising in excess of ordinary living costs. Utility costs now take a significant amount of the average person's pay. One indication that utility services are a larger portion of the average person's budget is the rising amount of bad debts. Utility companies sensitive to their customers have established budget plans and procedures to insure reasonable payment without discontinuance of services.

This Court reserved in *Jackson v. Metropolitan Edison*, supra, the question of whether or not utility services were property so that such services could not be terminated for nonpayment without procedural due process.

This Court has indicated that property interest may take many forms. A statement of the general principles of what is property is set forth in *Board of Regents of State Colleges vs. Roth*, 408 U.S. 564, 92 Sup. Ct. 2701. This Court states:

"Certain attributes of "property" interests protected by procedural due process emerge from these deci-

sions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily determined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

"Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement of those benefits."

92 S. Ct. at 2709

There is no state law which supports an absolute right to utility services when payment for such services is not forthcoming.

As stated in the Tennessee case of *Jones v. Nashville*, supra:

> "A notice is required to be given of the amount due and the time within which payment must be made before the supply is turned off, and no one can be taken by surprise, or should be unprepared to meet their just dues for the service rendered them."
>
> 109 Tenn. at 560.

There is, of course, a desire for continued utility services to enjoy air conditioning, watering one's lawn as

well as drinking water, but such should not be a property right under the Fourteenth Amendment. The right to continued service should be left to the reasonable rules of the utility either controlled by a State Utility Commission which requires nondiscriminatory rules and regulations or as controlled by a municipality which answers to the people.

Lindsey v. Normet, 405 U.S. 56 92 Sup. Ct. 862, is analogous in that this Court did not denigrate the importance of decent, safe and sanitary housing but were unable to perceive in the Constitution any constitutional guarantee of access to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. We believe likewise that utility services are also not guaranteed as a property right.

If this Court determines that the right to utility services is property so that termination for nonpayment requires procedural due process, then this is still an important question requiring this Court to give additional guidelines or principles for utilities to use in determining the requirements.

The procedures for termination of the Memphis Light, Gas and Water Division have been fairly fully set out in the Statement of the Case. Petitioners naturally believe the procedures for termination would meet any reasonable standard of procedural due process and that a pretermination evidentiary type hearing is not required. The petitioners contend that the right to consult credit and collection counselors who not only arrange

budget payments but extensions and who also can verify amounts of bills including re-reading of meters (33,000 were re-read upon complaints of high bills) is sufficient for any procedural due process.

Justice Marshall in his dissent in *Jackson v. Metropolitan Edison*, supra, indicated that the solution to the problem was to require an abbreviated pretermination procedure. He stated that at a minimum, due process would require advance notice of a proposed termination with a clear indication that a *responsible* company officer can readily be contacted to consider any claim of error. The Memphis Light, Gas and Water Division has a number of credit and collection counselors. While these will not be eliminated, Justice Marshall seems to indicate that there should be some type of Hearing Officer designated. In a large utility, this might cause delays instead of numerous credit and collection counselors with a supervisor on duty to handle any unusual problems.

Petitioners believe that this Court should determine that flexible due process procedural protections are demanded in balancing the rights of the utility with the rights of the consumer if the right to utility services is property. This Court in its recent decision of *Matthews v. Eldridge*, ... U.S. 44 *Law Week*, 4224, seems to outline the general principles which are considered in balancing. Petitioners contend that the Division procedures are consistent with these principles and meet Due Process standards.

The petitioners respectfully submit that the procedures of the Memphis Light, Gas and Water Division giving ample time for payment of the net amount, adequate notice of final payment and adequate explanation of the

right to contact company officials together with the personal contact or attempted personal contact and door-knocker notice left upon termination.

4. THE OFFERING OF UTILITY SERVICES BY A MUNICIPALLY OWNED UTILITY IS SUBSTANTIALLY SIMILAR TO A PRIVATE UTILITY.

The Court of Appeals for the Sixth Circuit stated that since the utility is municipally owned and controlled by the City that its actions are clearly "state actions."

The petitioners contended that under its Charter it operated as any private utility would operate in that it is required to have rates sufficient to meet its operating expenses and has no governmental immunity.

The operation of the utility services by a municipality has traditionally been a proprietary function. It is subject to suit by its customers for failure to extend services to them or of denying services to its customers. The customer may sue for damages. A municipal utility, just like the private utility, must extend services on a nondiscriminatory basis to all customers alike. It must adopt rates which are nondiscriminatory. It operates in all ways similar to a private utility except that its rates are set by the municipality, in most cases, as opposed to a state public service commission. Likewise, the officers of the utility are appointed by public officials. In the case of petitioners, the President and Board of Commissioners are nominated by the Mayor and approved by the Council and are subject to removal by them. Except for the appointment of such officers, the utility operates and functions like a private utility. A survey of other municipally owned utilities would find

that these utilities buy their electric power from not only Tennessee Valley Authority or other public bodies, but buy their power from private power distributors so that their rates for purchase of power are set for them by state commissions or the Federal Power Commission. Those purchasing gas from interstate gas distribution pipelines have the rates approved by the Federal Power Commission.

The Court should not hold as a general rule that the actions of a municipally owned utility are different from a private utility merely because of municipal ownership.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,
/s/ Frierson M. Graves, Jr.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served upon opposing counsel this Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit by mailing three (3) copies thereof postage prepaid to Thomas M. Daniel, Legal Services Association, 531 South Parkway East, Memphis, Tennessee, 38106.

This ..... day of July, 1976.

FRIERSON M. GRAVES, JR.

APPENDIX A

No. 75-1350

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WILLIE S. CRAFT and MARY CRAFT, Husband and Wife; Ms. IDA BELL HOLMES; Ms. ANNIE SUE FUNZIE; Ms. SARAH PARKS, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

MEMPHIS LIGHT, GAS AND WATER DIVISION; CALVIN HENZE, President and General Manager of Memphis Light, Gas and Water Division; HENRY T. WINKELMAN, Vice-President and member of the Board of Commissioners; ELIOT WHITTINGTON, Commissioner; ROBERT S. BOWERS, Commissioner; PATRICIA SHAW, Commissioner; and An Unknown Number of Unnamed Utilities Termination Personnel, on behalf of themselves and all others similarly situated,

Defendants-Appellees.

ON APPEAL from the United States District Court for the Western District of Tennessee, Western Division.

Decided and Filed April 12, 1976.

Before: PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

PECK, Circuit Judge. Named plaintiffs-appellants, Willie S. Craft, his wife Mary Craft, Sarah Parks, Ida Bell Holmes, and Annie Sue Funzie[1] filed this purported class action in district court challenging defendants-appellees' policies of terminating and of refusing to connect electric, gas and water services (collectively hereinafter "utilities") as unconstitutionally denying appellants' classes procedural due process and equal protection, respectively. The district court, after trial, found that there was no civil rights jurisdiction over municipally-owned MLG&W,[2] that a class action would be inappropriate, and, distinguishing *Palmer* v. *Columbia Gas*, 479 F. 2d 153 (6th Cir. 1973), that appellees' termination procedures comported with constitutional due process. We affirm in part, reverse in part, and remand.

CLASS ACTION

Preliminarily, we find no error in the district court's refusal to certify a class action. The district court

> "conclude[d] that this is not a proper case for class action (as to damages), however, except to the extent of declaratory judgment or other relief granted which

[1]The Crafts, Parks and Funzie asserted due process violations stemming from terminations, Holmes the equal protection violation from refusal to connect. The Crafts' termination allegedly arose from disputed bills, Parks' from MLG&W's failure to bill for several months, thereby preventing her, as a person of "limited income" from being able to pay one large bill, and Funzie's also from her inability to pay an "extremely large" first bill from her "quite limited income." No error is assigned on appeal in the district court dismissal of the Funzie claim. Indeed, appellants' counsel admits that Funzie failed to testify at trial "because, by agreement of counsel for both parties, her utilities had been terminated for failure to pay for current usage of utility services about which there was no dispute." Appellants' Brief 5. Funzie, therefore, will not hereinafter be referred to.

[2]See *Amen* v. *City of Dearborn*, —— F.2d —— (No. 74-1650, 6th Cir., filed March 24, 1976).

> may accrue to the benefit of others similarly situated to [appellants]. The question of fact common to members of the class on the question of damages, particularly, and also with respect to circumstances of a purported dispute over charges would predominate as to individuals rather than all members of the alleged class. The Court is not convinced that claims of the representative parties are typical of claims that may be made by the purported class with regard to various and myriad situations or circumstances pertaining to due process violations, if any."

As to a Fed.R.Civ.P. 23(b)(3) class asserting damage claims,[3] there would be no predominate common question of fact. See *Carter* v. *Kilbane*, 519 F.2d 1370 (6th Cir. 1975); *Hayes* v. *Board of Regents*, 495 F.2d 1326, 1329 (6th Cir. 1974). As to a Rule 23(b)(2) class asserting claims to injunctive and declaratory relief, the district court properly recognized that such relief to the extent "granted [would] . . . accrue to the benefit of others similarly situated," and, consequently, as the Eighth Circuit has recognized, "[n]o useful purpose would be served by permitting this case to proceed as a class action" because "[t]he determination of the constitutional question can be made by the Court and the rules and regulations determined to be constitutional or unconstitutional regardless of whether this action is treated as an individual action or as a class action." *Ihrke* v. *Northern States Power Co.*, 459 F.2d 566, 572 (8th Cir.), *vacated and remanded to dismiss as moot*, 409 U.S. 815 (1972). Accord, *Carter* v. *Butz*, 479 F.2d

[3]Appellants never expressly asserted a 23 (b) (3) class for damage claims, and their amended complaint explicitly admitted that, "while [they] bring this action for money damages as well as injunctive relief, the non-monetary issues clearly predominate over the monetary issues."

1084, 1089 (3rd Cir.), *cert. denied*, 414 U.S. 1094, 1103, (1973); *Martinez* v. *Richardson*, 472 F.2d 1121, 1126-27 (10th Cir. 1973); *Cockerel* v. *Caldwell*, 378 F. Supp. 491, 494 (W.D. Ky. 1974) (three-judge court); *Doe* v. *Wohlgemuth*, 376 F. Supp. 173, 181-82 (W.D. Pa. 1974) (three-judge court), *vacated on other grounds sub. nom. Doe v. Beal*, 523 F.2d 611, 613, n. 2 (3rd Cir. 1975) (en banc); *Koehler* v. *Ogilvie*, 53 F.R.D. 98, 101 (N.D. Ill. 1971) (three-judge court), *aff'd mem.*, 405 U.S. 906, 92 S.Ct. 938, 30 L.Ed.2d 777 (1972; *Holt* v. *Brown*, 336 F. Supp. 2, 6 (W.D. Ky. 1971) (three-judge court); *Nelson* v. *Likins*, 389 F. Supp. 1234, 1239 (D.Minn. 1974); *Mohr* v. *Jordan*, 370 F. Supp. 1149, 1151, n. 3 (D. Md. 1974); *aff'd*,—— F.2d —— (No. 74-1496, 4th Cir., filed July 31, 1974); *Rappaport* v. *Katz*, 62 F.R.D. 512, 515 (S.D.N.Y. 1974).

DUE PROCESS

On the merits, the Fourteenth Amendment requires due process only if "state action" is "depriv[ing] any person of life, liberty, or property." See, e.g., *Goss* v. *Lopez*, 419 U.S. 565, 95 S. Ct. 729, 735-36, 42 L.Ed.2d 725 (1975); *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 95 S. Ct. 449, 453-57, 42 L.Ed.2d 477 (1974).

Appellees claim that the due process clause has no application because MLG&W "operates just like a private utility in that it is required to have rates sufficient to meet its services . . . and has no governmental immunity." We conclude, however, that since it is municipally owned and controlled, the action of MLG&W are clearly "state actions." *Davis* v. *Weir*, 497 F.2d 139, 143-44 (5th Cir. 1974); *Stanford* v. *Gas Serv. Co.*, 346 F. Supp.

717, 720 (D. Kan. 1972). *Jackson, supra*, is inapposite because the majority and two dissenters independently recognized the distinction between "private utility compan[ies] and . . . municipal utility," 95 S. Ct. at 454 n. 8, or "state [government] — owned" companies. 95 S. Ct. at 464. The majority, in fact, at least five times recognized that Metropolitan Edison was "private" or "privately owned and operated." 95 S. Ct. at 451, 453, 454 n. 8, 457.

Though the Supreme Court has refrained from deciding whether a "claim to continued [utility] service was 'property' " for due process purposes, 95 S. Ct. 457, this court in *Palmer*, *supra*, implicitly assumed and other courts have expressly held that claims to continued utility service constitute "property." *Condosta* v. *Vermont Electric Cooperative, Inc.*, 400 F. Supp. 358, 365-366 (D. Vt. 1975); *Donnelly* v. *City of Eureka*, 399 F. Supp. 64, 67-68 (D. Kan. 1975); *Limuel* v. *Southern Union Gas Co.*, 378 F. Supp. 964, 966-67 (W.D. Tex. 1974); *Bronson* v. *Consolidated Edison Co.*, 350 F. Supp. 443, 447 (S.D.N.Y. 1972); *Stanford, supra*, 346 F. Supp. at 721; *Davis* v. *Weir*, 328 F. Supp. 317, 321 (N.D. Ga. 1971). See *Salisbury* v. *Southern New England Tel. Co.*, 365 F. Supp. 1023 (D. Conn. 1973) (continued telephone service "assume[d to be] . . . cognizable right within the due process clause"). But see *Jackson* v. *Metropolitan Edison Co.*, 483 F.2d 754, 759-62 (3rd Cir. 1973), *aff'd on other grounds*, 419 U.S. 345, 95 S. Ct. 449, 42 L.Ed.2d 477 (1974).

Having "determined that due process applies, the question remains what process is due." *Goss*, *supra*, 95 S. Ct. at 738, quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L.Ed.2d 484 (1972).

Though "[d]ue process is, perhaps, the least frozen concept of our law," *Palmer*, *supra*, 479 F.2d at 153, quoting *Griffin* v. *Illinois*, 351 U.S. 12, 20-21, 76 S. Ct. 585, 591, 100 L.Ed. 891 (1956), and defies "any concept of inflexible procedures universally applicable," *Goss*, *supra*,, 95 S. Ct. at 738, quoting *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961), *Palmer* has established that certain utility termination procedures fail to afford constitutional due process. See also *Limuel*, *supra*, 378 F. Supp. at 969; *Bronson*, *supra*, 350 F. Supp. at 448-50. "As a minimum," *Palmer* requires, notice and opportunity to be heard "in a meaningful time and in a meaningful manner." *Palmer*, *supra*, 479, F.2d at 165-66.

Notice. Constitutionally sufficient "shut-off" notice . . . [must] provide the customer with the information he needs to quickly and intelligently take available steps to prevent the threatened termination of service." 479 F.2d

at 166. Yet the MLG&W "final notice"[4] no better informs customers, like the Crafts, who dispute the underlying liability than the constitutionally deficient notice in *Palmer*. Like the Columbia Gas notice, therein, the MLG&W notice fails to mention "that a dispute concerning the amount due might be resolved through discussion with representatives of the company." Nor did the notice, at least prior to the opinion of the district court, inform the customer that "[c]redit [c]ounselors are available to clear up any questions, [to] discuss dis-

[4]

MEMPHIS LIGHT, GAS & WATER DIV.
FINAL NOTICE
THIS BILL IS NOW PAYABLE ONLY IN MAIN OFFICE
220 SOUTH MAIN OR AT MILLINGTON OFFICE

MEMPHIS LIGHT, GAS & WATER DIV.
P.O. BOX 388, MEMPHIS, TENN. 38145
PHONE 523-0711
INFORMATION CENTER

C-74-F
EXHIBIT
7

LAST DAY TO PAY	ACCOUNT NUMBER	AMOUNT DUE

IF NOT PAID BY 5 P.M. THIS DATE SERVICE WILL BE DISCONNECTED.

ACCORDING TO OUR RECORDS YOUR SERVICE BILL IS OVERDUE FOR PAYMENT. IF NOT PAID BY 5 P.M. ON THE DATE INDICATED, IT WILL BE NECESSARY TO TERMINATE THE SERVICE. AN ADDITIONAL CHARGE WILL BE MADE FOR DISCONNECTION.

IF PAID, PLEASE DISREGARD THIS NOTICE.

EXHIBIT

LAST DAY TO PAY	ACCOUNT NUMBER	AMOUNT DUE

IF NOT PAID BY 5 P.M. THIS DATE SERVICE WILL BE DISCONNECTED.

FINAL NOTICE

RETURN THIS STUB WITH PAYMENT

Enclosed with the "final notice is at least one of two "flyers." One flyer, mailed to approximately forty percent (40%) of MLG&W's customers, provides no better notice of dispute settlement possibilities than the "final notice."

"IMPORTANT NOTICE

"If you are having difficulty paying your utility bill, bring your bill to our neighborhood credit counselors for assistance. Your utility bills may be paid here also. (No phone calls accepted at neighborhood locations.)

"Place . . . .

"Time . . . .

"You can also receive credit help at the main office at 220 S. Main from 8:30 to 5 p.m. Monday through Friday.

"Phone: 523-0711."

puted bills or to make any needed adjustments."[5] See Marshall, J., dissenting in *Jackson, supra*, 95 S. Ct. at 464-65. Like the Columbia Gas notice, the MLG&W notice only warns the customer to pay or face termination. See *Davis* v. *Weir*, 359 F. Supp. 1023, 1026 (N.D. Ga. 1973); *Bronson, supra*, 350 F. Supp. at 450. That the MLG&W employee, who would physically terminate the services, was instructed to "attempt" a personal contact with the customer by knocking on the door immediately prior to termination is, of course, no notice to those customers absent from their residences.[6] Moreover, even if

Another flyer gives the customer notice of some dispute settlement possibilities.

> "If you are having difficulty paying your utility bill and would like to discuss a utility payment plan, *or if there is any dispute concerning the amount due,* bring your bill to the office at 220 South Main, Monday through Friday, or phone 527-0311 (sic)."

The testimony of MLG&W's secretary-treasurer, however, indicates that the latter flyer goes into "all bills, all final notices except those going to those specific areas that are accommodated by the community, credit counseling stations." Appendix 188. In sum, then, there is no assurance that the Crafts were mailed the just mentioned flyer.

[5] Though finding no due process denial, the district court "suggest[ed]" that appellees implement a notice "provid[ing] more specific information about customer service locations and personnel available to work out extended payment plans or adjustments of accounts in genuine hardships or appropriate situations." Appellees' counsel has appended to his brief a copy of the "new" notice, adopted pursuant to the district court's suggestion.

> "If you are having difficulty paying your utility bill due to genuine hardship and would like to work out a mutually satisfactory agreement for payment, the Memphis Light, Gas and Water Division has experienced and trained Credit Counselors available. There are supervisors and other management personnel available if you are not satisfied with the answers or solutions given by the Credit Counselors."

Of course, we imply no view as to the constitutional sufficiency of that notice.

[6] Mrs. Craft testified that she received no such personal notice, and the MLG&W secretary-treasurer left open the possibility of no personal contact being made nearly one-half the time. Appendix 313-14.

a contact were made, the employee was instructed to terminate unless there was a "hardship," illness, or "payment [were] in the mail," rather than informing the customer of his alternatives, the notice of which *Palmer* requires.

The MLG&W "final notice," however, is constitutionally sufficient for a customer like Parks, who asserts an inability to pay an admitted liability. The customer "having difficulty paying [the] utility bill" is instructed to "bring [the] bill to [certain] neighborhood credit counselors for assistance" and-or to the MLG&W offices "to discuss a utility payment plan." See footnote 4, *supra.*

Hearing. Constitutionally sufficient hearing procedures cannot depend solely on "unsupported assumption[s] of corporate good faith." *Palmer, supra,* 479 F.2d at 168. Like Columbia Gas, MLG&W has "no established procedures for resolution of disputes." Indeed, the MLG&W secretary-treasurer at first refused to acknowledge that there could be a bona fide dispute as to a customer's liability for consumed utilities.[7] That MLG&W, unlike Columbia Gas, had established "procedure[s] for negotiation of partial payment of delinquent accounts in lieu of termination,"[8] of course, provides no avenue for customers who, instead of claiming

[7] The secretary-treasurer later acknowledged that there could be a dispute if MLG&W were attempting to bill a "customer" because of his presence and use of utilities at certain premises, rather than having those utilities listed in his name, when the customer claimed he "didn't live there." Appendix 268-273. He also admitted that disputes could arise from gas and plumbing "leaks." Appendix 278-79. See *Limuel* v. *Southern Union Gas Co.*, 378 F. Supp. 964 (W.D. Tex. 1974); *Davis* v. *Weir,* 328 F. Supp. 317 (N.D. Ga. 1971).

[8] Unlike the undefined, or at best ill-defined, dispute settlement mechanisms, MLG&W had a rather well-defined, and well-publicized, "extended payment plan," permitting the partial payment of certain delinquent accounts to forestall utilities termination. See, e.g., Appendix 45-58.

an inability to pay in full an admitted utilities liability (Parks), dispute the existence of the liability (Crafts). See footnote 1, *supra*.

EQUAL PROTECTION

Appellant Holmes claims that MLG&W's refusal to initiate service to her at 730 Chelsea Avenue, Memphis, because of an outstanding utility bill at 730 Chelsea violated her Fourteenth Amendment right to equal protection. Neither Holmes nor MLG&W disputes the district court findings that utilities services at 730 Chelsea was in the name of one Sylvester Wade beginning July 17, 1973, and that Holmes lived with Wade at 730 Chelsea until August, 1973. When Holmes applied for utilities service in her name upon returning to 730 Chelsea in December, 1973, MLG&W refused her application because of $245 in unpaid utilities bills at 730 Chelsea. The district court, however, found that Holmes was responsible for only $170 in unpaid utilities bills, the district court viewing her as being responsible for services supplied during her presence at 730 Chelsea but not responsible for services supplied in another's name in her absence. MLG&W refused Holmes' offer to pay one-half of the outstanding bill and refused to turn on her utilities until she paid the outstanding bill in full. Appellees cite *Siegl* v. *Minneapolis Gas Co.*, 271 Minn. 127, 135 N.W.2d 60, 63 (1965), but *Siegl* is factually inapposite because there is no evidence that Wade remained present at 730 Chelsea after December, 1973, so that by applying in Holmes' name Wade could "obtain indirectly the very thing the utility was privileged to deny him directly." Indeed, Holmes uncontradictedly testified that Wade moved out, pursuant to agreement,

prior to her return to 730 Chelsea. We view *Davis* v. *Weir*, 497 F.2d 139, 144-45 (5th Cir. 1974), which rejected a similar policy of the City of Atlanta Water Works as being more factually on-point.

> "[T]he Department's discriminatory rejection of new applications for water service based on the financial obligations of third parties fails to pass muster under the traditional 'rational basis' analysis . . . . [Plaintiffs'] complaint is that the Water Works has divided those who *apply* for its services into two categories: applicants whose contemplated service address is encumbered with a pre-existing debt (for which they are not liable) and applicants whose residence lacks the stigma of such charges . . . . The Water Works urges that the practice of rejecting water service applications until all accrued debts at the premises have been extinguished facilitates collection of unpaid bills at multi-unit dwellings . . . . [But a collection scheme] that divorces itself entirely from the reality of legal accountability for the debt involved, is devoid of logical relation to the collection of unpaid water bills from the defaulting debtor. The City has no valid governmental interest in securing revenue from innocent applicants who are forced to honor the obligations of another or face constructive eviction from their homes for the lack of an essential to existence — water."

We accept *Weir*, and consequently hold that MLG&W unconstitutionally refused to install services in Holmes' name.

Refusal to certify class affirmed; holding of due process compliance with Crafts reversed; holding of due

process compliance with Parks affiirmed; holding of no equal protection violation against Holmes reversed; and remanded. The parties will bear their own costs of this appeal and no costs are taxed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

WILLIE S. CRAFT, et al,
Plaintiffs,

vs.

NO. C-74-86

MEMPHIS LIGHT, GAS & WATER DIVISION, et at,
Defendants.

MEMORANDUM OPINION

I

The plaintiffs, customers of Memphis Light, Gas and Water Division (hereinafter called MLG&W), brought this suit on their own behalf and on behalf of all others similarly situated for injunctive, declaratory and money damage relief, alleging that the defendants had caused to be terminated or had terminated the utility service of the plaintiffs under color of state law in violati of the plaintiff's constitutional right to due process of law under the Fourteenth Amendment to the United States Constitution.

The Defendant, MLG&W, is a large utility distributor of services and owned by the City of Memphis, Tennessee, as provided by Tennessee Private Acts of 1939, Chapter 381 (as amended). It is directed by a board of commissioners appointed by the City Council of Memphis, Tennessee, and is thus under the ultimate control of the government of the City of Memphis, though operated as a separate division. The individual defendants

are the president and general manager, the vice president, and the members of the board of commissioners of MLG&W, as well as two employees of MLG&W who have had responsibility for terminating customer's utility services as well as a class of others standing in the same position.

The named plaintiffs, Willie S. Craft and Mary Craft, husband and wife; Ms. Ida Bell Holmes; Ms. Annie Sue Funzie; Ms. Sarah Parks are or have been customers of the MLG&W.

II

MLG&W has approximately 235,879 residential consumers of electricity, 201,806 residential consumers of gas and 165,257 residential consumers of water. The steps in providing and terminating service to customers utilized by the MLG&W are as follows:

1. Service is connected upon request by telephone through the Information Center, or in person.

2. If meter reading date falls within five days after connection of service, no bill will be rendered. The first billing, therefore, will be for consumption over a period of from 6 to 35 days.

3. Approximately four days after meter reading date, a bill is mailed to service address or to any address designated by customer.

4. As indicated on the bill, the last day to pay net amount would be approximately 20 days after meter reading date.

5. Approximately 24 days after the meters are read, a final notice is mailed stating that services will be disconnected within approximately four days if no payment is received or some provision made for payment of the outstanding balance. Final notice however is not mailed if a customer owes less than $26.00 or MLG&W holds a deposit as much as twice the outstanding balance. A "flyer" is included with the final notice requesting the customer to contact Credit and Collections Department if he is having difficulty paying the bill, and also announcing an appropriate neighborhood location for credit assistance.

6. As indicated on the final notice, one service (electric) will be terminated by the meter reader. Cut-off of service will not usually be effected if in response to the meter reader's oral communication before cut-off the customer states that payment is in the mail or shows a paid receipt, or there is illness. If customer is not contacted, the meter reader or the person terminating service is instructed to leave a cul-off notice giving information about restoration of service. A customer may avail himself of an extended payment plan to answer or contact the Division requesting an extension of time in which to pay the asserted bill.

7. Approximately five days after the one electric service cut-off, the remaining services (gas and water) will be terminated if the customer has not paid the bill or made other arrangements for payment such as, for example, employing the extended payment plan.

8. If a customer has not contacted the Division within approximately 10 days after all services are terminated, a customer serviceman is requested to verify that all

services are still off. If a customer serviceman finds an unauthorized reconnection of services, the services will again be cut-off.

9. After an additional 20 days from previous verification, if the meter reader on his regular scheduled meter reading route finds a second unauthorized reconnection, an order is issued for the removal of meters.

III

The extended payment plan was put into effect by the MLG&W on or about March 1, 1973, to prevent utility disconnection of customers who show financial hardship. A customer who is in temporary financial difficulty may be permitted to make a partial payment on his utility bill and postpone payment of the remaining portion without discontinuance of utility services. Basically the plan allows for one-half (1/2) payment of a past due bill with the balance being extended in equal payments on three subsequent bills. Each such account, however, is handled on an individual basis with an initial payment sometimes varied and as much as twelve months being allowed for payment of the balance in extreme hardship cases. A customer claiming a hardship that would cause his utilities to be in jeopardy may apply by contacting the Credit Department of MLG&W. This plan was publicized at the time it was put into effect.

Each of the plaintiffs is participating in or has participated in the extended payment plan. In 1973, the vast majority of customers requesting extensions for payment obtained an extension.

IV

Credit counselors assist customers who have difficulty

with payments or disputes concerning their bills with MLG&W. If those counselors cannot satisfy the customer, then the customer is referred to management personnel; generally the chief clerk in the department; then the supervisor in credit and collection. In addition, a dissatisfied customer may appeal to the Board of Commissioners of MLG&W as to complaints regarding bills, service, termination of service or any other matter relating to the operation of the Division. A customer may, if he so desires, be accompanied by an appropriate representative. The billing of customers, the determination as to when a final notice is sent, and the termination of service is governed by policies, rules and regulations adopted and approved by the Board of Commissioners of MLG&W.

V

Mr. and Mrs. Willie S. Craft have lived in a dwelling at 1019 Alaska in Memphis, Tennessee, since October, 1972, which they have used as a one family dwelling, although more than 10 persons have resided there. From October, 1972 until July, 1973, they encountered no difficulty with the defendant, MLG&W. They received utilities on MLG&W account number 02-012-18-660-2 for this period of time and their payments on this account remained current. At the time they moved into the premises, the Crafts noticed that there were two separate gas and electric meters outside the house. The seller of the residence told the Crafts not to concern themselves with the meter situation and they relied on his representation. The residence had in fact previously been used as a duplex and the Crafts noticed upon moving in that there was evidence of two apartments or living areas in the house, as there was evidence of an-

other kitchen in the house. There was, however, only one water meter serving the premises and the Crafts paid no water bill from October 9, 1972 until January 5, 1973.

In 1973, Mr. and Mrs. Craft received two bills; their regular bill, and a second bill with an account number 02-012-18-662-4 in the name of Willie C. Craft. The Crafts received a separate bill for each meter and city service fee[1] on each bill. The meters were combined to one gas and one electric meter in October, 1973, by a private plumber and electrical contractor, as ordered and paid by the Crafts. The Crafts did not, however, receive a single bill (instead of two) until January, 1974, because of problems attendant to the combination of meters by the Crafts' contractor. The Crafts began participation in the extended payment plan in November, 1973.

After the appearance of this second billing covering 1019 Alaska, Mrs. Craft made several trips to the offices of the defendant to try to straighten out the matter, for which she had to take time off from work. On five different occasions the utilities of Mr. and Mrs. Craft were terminated. Each time the MLG&W sent final notices but did not personally contact the Crafts or others at the residence prior to disconnecting service. During one of those terminations of water, the Craft family was without water from MLG&W during the summer for about one week. On one occasion when Mrs. Craft was attempting to avert a utilities termination, after final notice, she called the defendant's offices and explained that she had paid a bill, but was given no satisfaction. The procedure for an opportunity to talk with management was

[1] The city service fee is a separate item on the regular utility bill as specified by the City of Memphis Code 19-14.

not adequately explained to Mrs. Craft, although she repeatedly tried to get some explanation for the problems of two bills and possible duplicate charges.

All during the time of these disputes Mr. and Mrs. Craft made good faith efforts to pay for their utilities as well as to straighten out the problem. Of the balance claimed by MLG&W in March, 1974, some involved possible gas overcharges and double or duplicate billings with respect to city service fees.

VI

Mrs. Ida Bell Holmes' dispute with MLG&W involved her attempt to move back to her house at 730 Chelsea Avenue, Memphis, Tennessee,[2] and the defendant's refusal to initiate utility services to her until she paid an outstanding utility bill at that address in the amount of $245.56. Mrs. Holmes had formerly lived at 730 Chelsea with Mr. Sylvester Wade for several years. The utility service at that address had, at one time during 1972, been placed in the name of Mrs. Holmes' son, Jessie Lee Holmes;[3] the utility service was placed in the name Sylvester Wade beginning July 17, 1973. During August of 1973, Mrs. Holmes left Mr. Wade and moved to her sister's residence in Memphis. At the time she moved, she claimed that the outstanding utility bill was $42.76 including $25.00 for the deposit due when service was connected in the name of Sylvester Wade.

Mrs. Holmes subsequently moved to an address at 796 Love Alley during October of 1973, and utilities were

[2] Sylvester Wade and Ida Bell Holmes purchased the property at 730 Chelsea Avenue in March of 1972.

[3] When service was terminated in the name of Jessie Lee Holmes in June, 1973, there was a delinquent balance of $144.29.

connected in her name at that address on that date. She paid her regular monthly utility bills and had no problems with the defendants concerning her bills at that address. However, when she attempted to move back to the address at 730 Chelsea, the defendants refused to turn on her utility services until she paid the outstanding bill, including the amount due from the time she and her family had previously occupied this residence.

Mrs. Holmes was responsible for at least a substantial part of this bill, but she was not responsible for all of it due to Sylvester Wade's default. At the time she moved from 730 Chelsea she owed a utility bill to the defendants for actual usage. Subsequent to her move, a bill of $144.29 was sent to 730 Chelsea which was the final bill on the account in the name of her son, Jessie Lee Holmes. A total of these two accounts, approximately $170.00 to $175.00 was the part for which Mrs. Holmes should have been held responsible.

MLG&W attempted to charge the full amount of outstanding bill left by Sylvester Wade, or $245.56, to Mrs. Holmes before they would initiate service to her. Mrs. Holmes offered to pay one-half of the outstanding bill, but this offer was refused by the defendants.

As a result of the defendants' actions, Mrs. Holmes delayed moving back into her home until 1974, after the present suit was filed.

VII

Mrs. Sara Parks moved into a house at 1192 Coker Street, Memphis, Tennessee, sometime about September or October, 1972. Mrs. Parks did not receive her first billing from the MLG&W until late February or early March, 1973. The first bill received was in the amount

of $280.34, representing all the charges up until that time. Mrs. Parks made some attempt to make small partial payments, and MLG&W deferred part of the outstanding amount of the bill. Mrs. Parks was never able to pay the full bill due to her limited income. Consequently her utility services were terminated on July 1, 1973. Mrs. Parks later moved to another address and had utility services instituted in the name of her son. She received regular monthly billings at this address and has kept her bill current. The problem that Mrs. Parks has had with the defendants has not been a dispute concerning the amount of her bill, but has been difficulty in paying her bill due to not being billed for several months.

Although the defendants have some extended payment plans for assisting customers such as Mrs. Parks in hardship situations, these plans generally allow for the extension of only one half of the outstanding bill. Mrs. Parks lived at 1192 Coker for approximately 10 months and paid only $50.00 to MLG&W for utility services during that period of time. Mrs. Parks has paid nothing on the delinquent bill and a lawsuit was filed by the Division against Mrs. Parks for it.

VIII

Mrs. Annie Sue Funzie did not appear to testify at the trial of this cause. Mrs. Funzie has had her utility services terminated by MLG&W at least two times and each time service was reconnected by others than employees of the Division and without the knowledge and approval of the Division or without payment of her delinquent account. Service to 968 Leath for Mrs. Funzie was connected on September 21, 1973, and she moved from that address on March 13, 1974, owing $161.26. Mrs. Funzie

admits in her complaint that she received final notice from the Division in December, 1973, when living at 968 Leath. Mrs. Funzie was granted an extension at her request on December 26, 1973, while living at 968 Leath. Mrs. Funzie moved to 1091 Leath and service was instituted on March 13, 1974. Mrs. Funzie paid nothing at the 1091 Leath address.

IX

The Court concludes that if a right of action in this forum and jurisdiction is properly established, only the Crafts have actually established any damages or asserted any real basis for a cause of action by reason of MLG&W actions. There has been demonstrated no willful or intentional violation of plaintiff's claimed rights under due process by defendant in any event. Plaintiffs have sued as representatives of a class of all persons claiming to have a dispute with MLG&W about their utility bills, resulting in termination where full payment of the MLG&W bill has not been made. We conclude that this is not a proper case for class action (as to damages), however, except to the extent of declaratory judgment or other relief granted which may accrue to the benefit of others similarly situated to the Crafts. The question of fact common to members of the class on the question of damages, particularly, and also with respect to circumstances of a purported dispute over charges would predominate as to individuals rather than all members of the alleged class. The Court is not convinced that claims of the representative parties are typical of claims that may be made by the purported class with regard to various and myriad situations or circumstances pertaining to due process violations, if any.

X

First, however, it must be determined whether jurisdiction lies against defendant under 42 U.S.C. §1983 wherein plaintiffs assert a violation of lawful rights "under color of state law."[4] Under the rationale of City of Kenosha v. Bruno, 412 U.S. 507, 41 U.S.L.W. 4819 (1973), a municipality or governmental unit standing in that capacity is not a "person" within the meaning of this post-civil war statute. MLG&W is not a "person" within the meaning of this statute as to equitable relief sought or as to damages sought under 42 U.S.C. §1983. Plaintiffs have also sued individual commissioners, offcials and employees of MLG&W.

XI

Plaintiffs have also sued for equitable and other relief under the Fourteenth Amendment for alleged violation of their due process rights. They cite *Akron Board of Education v. State Board*, 490 F.2d 1285 (6th Cir. 1974) in which it was stated in the majority opinion that "injunctive relief may be had to restrain members of a Board of Education . . . from violating the Fourteenth Amendment." 490 F.2d 1292[5] (claiming jurisdiction under 28 U.S.C. §1343(3) and (4).

We consider then whether plaintiffs have established that the procedure here involved in resolution of utility

[4] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, priveleges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[5] It was noted that the decision applied to "the unique facts of this case." 490 F.2d 1291.

payments and termination of services in event of non-payment violates due process.

First of all, it is clear that Tennessee state law sanctions termination of service of utilities such as water for non-payment. *Patterson v. City of Chattanooga*, 192 Tenn. 269, 241 S.W.2d 291 (1951). See also *Jones v. Nashville*, 109 Tenn. 550, 72 S.W. 985 (1902). This question was also considered in *Jackson v. Metropolitan Edison*, 483 F.2d 754 (3rd Cir. 1973). Like that court, "we do not believe there is a property right to be furnished utility service without payment."[6] *Jackson v. Metropolitan Edison Co., supra*, holds squarely that "a right to receive utility service pending resolution of a dispute between a customer and the company is [not] protected by the Constitution of the United States." 483 F.2d 762. This holding is now before the United States Supreme Court for resolution and determination. Plaintiffs, on the other hand, rely upon *Palmer v. Columbia Gas*, 479 F.2d 153 (6th Cir. 1973), holding under the circumstances of that case a violation of due process in a private utility's termination of services to its customers. The factors relied upon heavily in the *Palmer* case, not present in the MLG&W procedures, were:

1. serious discrepancy between estimated bills and bills based upon actual readings;

2. no usual contact with the customer by the "cut-off" personnel; no door knocker notice;

3. often "significant and tragic" notice mistakes made by the utility company;

[6] 483 F.2d 761, f.n. 14.

4. uncritical reliance by local personnel on a computer "located in a distant city"; (479 F.2d 158).

5. no mailed termination notice "flyer" with regard to termination procedure;

6. frequent mistaker sending of shut-off notices despite agreements for extended payment;

7. "a rather shockingly callous and impersonal attitude upon the part of defendant."

It was also stated in that case that "the question of what constitutes due process of law can only be answered in relation to the circumstances of each particular case." *Palmer, supra*, p. 165. The circumstances here present indicate minimal notice of proposed action and a minimum opportunity to be heard. Significantly here also MLG&W has established a procedure for negotiation of partial payment of delinquent accounts in lieu of immediate termination, something not accomplished by Columbia Gas of Ohio in the *Palmer* case. To be sure, MLG&W sent out many final notices warning of prospective termination that did not result in actual cessation, but usually this triggered an opportunity for extended payments where circumstances so indicated.

None of the individual plaintiffs were deprived of due process opportunity to be heard, nor did the circumstances indicate any substantial deprivation except in the possible instance of Mr. and Mrs. Craft. *Ihrke v. Northern States Power*, 459 F.2d 566 (8th Cir. 1972) vacated as moot 409 U.S. 815, in similar circumstances, also held that an action of this kind was not properly considered as a class action on behalf of all persons who had made application for service.

The individually named defendants in this case are not immune from suit under the civil rights statute involved, but are entitled to a qualified immunity only based upon exercise of good faith. They would be individually liable only for wrong or harm intentionally or subjectively inflicted upon plaintiffs. *Ka-Haar, Inc. v. Huck, et al*, 345 F.Supp. 54 (E.D. Wis. 1972); *Nelson v. Knox*, 256 F.2d 312 (6th Cir. 1958); *Cobb v. City of Malden*, 202 F.2d 701 (1st Cir. 1953); *O'Brien v. Galloway*, 362 F.Supp. 901 (D.C. Del. 1973). Liability asserted and shown, by the Crafts only, and at most, could be based upon some negligence or oversight on the part of defendants in their carrying out of their official duties, not any conscious and deliberate participatory act by defendants.

There is also the question as to whether judgment for damages, if any, were awarded against the individual defendants would be payable out of the public treasury and therefore subject to Eleventh Amendment immunity. *O'Brien v. Galloway, supra; Samuel v. Univ. of Pittsburgh*, 375 F.Supp. 119 (E.D. Pa. 1974); *Ford Motor Co. v. Indiana*, 323 U.S. 459 (1945); *Jordan v. Gilligan*, ... F.2d ..... (No. 73-1973, 6th Cir. 1974).

As a matter of simple equity, whether on the principles of pendant jurisdiction, or on the basis of a very limited possible denial of due process to Mr. and Mrs. Craft *only*, this Court does hope that MLG&W may issue credit to Mr. and Mrs. Craft in the amount of $35.00, representing duplicate and unnecessary charges made and expenses incurred by Mr. and Mrs. Craft with respect to terminations which should have been unnecessary had effectual relief been afforded them as requested.

Furthermore, this Court suggests, though it does not

necessarily require, that MLG&W in the future send a certified or registered mail notice of termination at least four days prior to termination, the reasonable cost for which may be added to that customer's account by MLG&W, to a prospective customer to be cut off. Furthermore, such notice of termination should provide more specific information about customer service locations and personnel available to work out extended payment plans or adjustments of accounts in genuine hardships or appropriate situations.

In view of the limited possible relief indicated in this case at this time, (without prejudice to any future showing of a want of due process under other circumstances) the Court presently awards no attorney's fee to plaintiff's counsel, a representative of Memphis & Shelby County Legal Services Association, but will assess costs against the defendant.

The cause will be retained for 30 days for proposed forms of notification herein suggested and an opportunity for the parties affected to submit information and memoranda relative to its necessity, feasibility and/or desirability in light of the Court's findings and conclusions herein set forth. Also, the parties may submit memoranda with respect to whether and if so, to what extent, attorney's fees would or should be allowable, if at all.

This ..... day of November, 1974.

Harry W. Wellford

UNITED STATES
DISTRICT COURT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISON**

WILLIE S. CRAFT, et al,
Plaintiffs,

vs. NO. C-74-86

MEMPHIS LIGHT, GAS &
WATER DIVISION, et al,
Defendants.

ORDER

In a memorandum opinion dated November 26, 1974, the Court found that, contrary to plaintiffs' contentions, no cause of action was stated against defendant Memphis Light, Gas & Water Division under 42 U.S.C. §1983, and that defendants had not violated plaintiffs' due process rights under the facts and circumstances of this case. The Court relied upon *Jackson v. Metropolitan Edison Co.*[1] in this holding, which has now been affirmed by the United States Supreme Court. ____ U.S. ____ (12-23-74) 43 L.W. 1097, 4110. At the same time, the Court distinguished the procedures being utilized by defendants in this case from those employed in *Palmer v. Columbia Gas*, 479 F.2d 153 (6th Cir. 1973). The Court did, however, suggest certain amendments and changes to improve the procedures used in terminating utility service for non-payment and with respect to negotiating disputes and difficulties about the outstanding amount of bills.

Even though no legal cause of action was proven for the reasons given, the Court also suggests that defend-

[1] 483 F.2d 754 (3rd Cir. 1974).

ants issue a credit to Mr. and Mrs. Craft, and this has been done. Additionally, defendants have instituted some new procedures which will give more definitive and adequate notice to customers of possible or impending cut-off of services.

Under the circumstances, plaintiffs' counsel is not entitled to an award of attorney fees. Defendants have not been guilty of any deliberate wrongdoing in denying plaintiffs their constitutional or lawful rights so as to justify an assessment punitive in nature. There is no common fund or substantial benefit to a class achieved by plaintiffs' counsel.

The cause is now dismissed and costs are assessed against defendants.

This ____ day of December, 1974.

Harry W. Wellford

UNITED STATES
DISTRICT COURT JUDGE

APPENDIX C

AMENDMENT 14

§ *1. Citizenship—Due process of law—Equal protection.*—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 683. Rules and regulations of commissioners.

Said board of light, gas and water commissioners shall have the power and authority to promulgate and enforce such rules and regulations governing the distribution of light, power, gas and water, as they may deem proper in the operation of said light, gas and water division. (Priv. Acts 1939, ch. 381, § 8)

Sec. 691. Disposition of revenue of light division.

The revenue received each year from the operation of the light division, before being used for any other purpose, shall be used for the following purposes, in the order named, to-wit:

(1) The payment of all operating expenses of the light division for the year.

(2) For interest accruals and sinking fund accruals on bonds and mortgages issued for the benefit of the light division.

(3) For cash payments to a working capital reserve, a renewals and replacement reserve, and a casualties reserve, for the benefit of the light division, said cash payments to said reserves to be in such amounts as the light, gas and water commissioner think proper and by resolution elect to set up from time to time.

(4) For payment to the general funds of the municipality a sum equal in amount to what would be the city taxes on the properties of the light division within the city limits of the City of Memphis if said properties were privately owned.

(5) For payment to a reasonable surplus account which may be used by the board of light, gas and water commissioners for extensions and improvements to the light plant or system and/or for the purchase of outstanding bonds that may have been issued for the benefit of the light division, as the board of light, gas and water commissioners may deem advisable.

(6) For payment to the general funds of the municipality a sum not to exceed a cumulative return of six per cent (6%) per annum of the equity or investment, if any, of the municipality in the properties of the light division, the said percentage to be fixed by resolution of the board of commissioners of the City of Memphis. Should the said percentage as fixed by the board of commissioners of the City of Memphis exceed a reasonable figure in the opinion of the board of light, gas and water commissioners, the amount to be paid by the board of light, gas and water com-

missioners to the board of commissioners of City of Memphis shall be determined by a board of arbitration, consisting of one member of the board of city commissioners and one member of the board of light, gas and water commissioners, who shall elect a third member, and the findings of this board of arbitration shall be final and binding on both the board of city commissioners and the board of light, gas and water commissioners.

Provided that in no event shall the aforesaid payment to the municipality for any year exceed one-half of the net profits realized by the light division during that year, unless the board of light, gas and water commissioners shall, by resolution, consent thereto.

(7) Any surplus then remaining, over and above safe operating margins, shall be devoted solely to rate reduction.

It is further provided that said allotment of funds may be changed in such manner as may be deemed necessary by the board of light, gas and water commissioners in contracting with the Tennessee Valley Authority for the purchase of power, or as may be deemed necessary by the board of commissioners of the City of Memphis, with the approval of the board of light, gas and water commissioners, in the issuance and sale of any bonds or notes on behalf of the electric system, or on behalf of the electric system in conjunction with the gas or water systems. (Priv. Acts 1939, ch. 381, § 19)

Sec. 692. Disposition of revenue of water division.

The revenue received each year from the operation of the water division, before being used for any other purpose, shall be used for the following purposes, in the order named, to-wit:

(1) For the payment of all operating expenses of the water division for the year.

(2) For interest accruals and sinking fund accruals on bonds or mortgages issued for the benefit of the water division.

(3) For cash payments to a working capital reserve, a renewals and replacement reserve, and a casualties reserve, for the benefit of the water division. Said cash payments to said reserves to be in such amounts as the light, gas and water commissioners think proper and by resolution elect to set up from time to time.

(4) For the payment to the general funds of the municipality a sum not to exceed a cumulative return of three per cent (3%) per annum of the equity or investment, if any, of the municipality in the properties of the water division, the said percentage to be fixed by resolution of the board of commissioners of the City of Memphis. Should the said percentage as fixed by the board of commissioners of the City of Memphis exceed a reasonable figure in the opinion of the board of light, gas and water commissioners, the amount to be paid by the board of light, gas and water commissioners to the board of commissioners of the City of Memphis shall be determined by a board of arbitration, consisting of one member of the board of city commissioners and one member of the board of light, gas and water commissioners,

who shall select a third member, and the findings of this board of arbitration shall be final and binding on both the board of city commissioners and the board of light, gas and water commissioners.

(5) Any surplus thereafter remaining shall be retained by the board of light, gas and water commissioners and may be used by them for expansion and enlargement of the water division and/or purchase of bonds that may have been issued and outstanding for the benefit of said division.

(6) Any surplus thereafter remaining over and above safe operating margins, shall be devoted to rate reduction.

It is further provided that said allotment of funds may be changed in such manner as may be deemed necessary by the board of commissioners of the City of Memphis with the approval of the board of light, gas and water commissioners in the issuance and sale of any bonds or notes on behalf of the water system, or on behalf of the water system in conjunction with the gas or electric systems. (Priv. Acts 1939, ch. 381, § 20)

Sec. 693. Disposition of revenue of gas division.

The revenue received each year from the operation of the gas division, before being used for any other purpose, shall be used for the following purposes, in the order named, to-wit:

(1) For the payment of all operating expenses of the gas division for the year.

(2) For interest accruals and sinking fund accruals on bonds or mortgages issued for the benefit of the gas division.

(3) For cash payments to a working capital reserve, a renewals and replacements reserve, and a casualties reserve, for the benefit of the gas division. Said cash payments to said reserves to be in such amounts as the light, gas and water commissioners think proper and by resolution elect to set up from time to time.

(4) For payment to the general funds of the municipality a sum equal in amount to what would be the city taxes on the properties of the gas division within the city limits of the City of Memphis if said properties were privately owned.

(5) For payment to a reasonable surplus account which may be used by the board of light, gas and water commissioners for extensions and improvements to the gas plant or system and/or for the purpose of outstanding bonds that may have been issued for the benefit of the gas division, as the board of light, gas and water commissioners may deem advisable.

(6) For the payment to the general fund of the municipality a sum not to exceed a cumulative return of six per cent (6%) per annum of the equity or investment, if any, of the municipality in the properties of the gas division, the said percentage to be fixed by resolution of the board of commissioners of the City of Memphis. Should the said

percentage as fixed by the board of commissioners of the City of Memphis exceed a reasonable figure in the opinion of the board of light, gas and water commissioners, the amount to be paid by the board of light, gas and water commissioners to the board of commissioners of the City of Memphis shall be determined by a board of arbitration, consisting of one member of the board of city commissioners and one member of the board of light, gas and water commissioners who shall select a third member, and the findings of this board of arbitration shall be final and binding on both the board of city commissioners and the board of light, gas and water commissioners.

Provided that in no event shall the aforesaid payment to the municipality for any year exceed one-half of the net profits realized by the gas division during that year, unless the board of light, gas and water commissioners shall, by resolution, consent thereto.

(7) Any surplus thereafter remaining over and above safe operating margins, shall be devoted solely to rate reduction.

Is is futher provided that said allotment of funds may be changed in such manner as may be deemed necessary by the board of commissioners of the City of Memphis, with the approval of the board of light, gas and water commissioners, in the issuance and sale of any bonds or notes on behalf of the gas system, or on behalf of the gas system in conjunction with the electric or water systems. (Priv. Acts 1939, ch. 381, § 22; Priv. Acts 1945, ch. 18, § 1; Priv. Acts 1947, ch. 491, § 1; Priv. Acts 1959, ch. 224, § 1)

APPENDIX D

CHART NO. 2

STEPS FOLLOWED IN TERMINATING SERVICES NEW OR SLOW PAYING CUSTOMER

Jan. 2	Jan. 31	Feb. 6	Feb. 20	Feb. 25	Mar. 1	Mar. 7	Mar. 14	April 1	April 8
Request for Service	Meters Read	Bills Mailed	Last Day to Pay Net	Final Notice Mailed	Meters Read & 1 Serv. Cut-Off	All Serv. Cut-Off	Verified DCO	Meters Read	Occupant Letter
1	2	3	4	5	6	7	8	9	10

April 11	May 1	May 8	May 31	June 10
All Serv. Cut-Off	Meters Read	Second Occupant Cut-Off	Meters Read	Meters Removed
11	12	13	14	15

3. BILLED FOR CONSUMPTION AND $25.00 DEPOSIT.
6. ELECTRIC SERVICE (ONLY) CUT-OFF BY METER READER AFTER EFFORT TO CONTACT CUSTOMER.
7. BALANCE FROM BILL MAILED FEBRUARY 6, BROUGHT FORWARD.
8. IF NO CONTACT WITH MLGW BY CUSTOMER.
9. IF CONSUMPTION FOUND, PROCEED TO No. 10.
10. APPROXIMATELY 65 DAYS CONSUMPTION.

CHART NO. 4

ADDITIONAL INFORMATION AND METHODS USED IN WORKING WITH HARDSHIP CUSTOMERS

1. Delinquent (Final) Notices Mailed in 1973 202,000
2. One Service Cut-Offs Issued 47,000
3. One Service Cut-Offs Completed 22,000
4. All Service Cut-Offs (DCO) Issued 26,000
5. All Service Cut-Offs Completed (Est.) (62%) 16,000
6. Customer Contacts by Credit Department
   (A) Main Office 62,000
   (B) Neighborhood Counselling Locations 3,500
   (C) Telephone ..... Amount Undetermined
7. Extensions Granted (91%) 43,000
8. Budget Billing Offered.
9. Meter Readers' Attempt To Contact Customer on High Reading.
10. Gross Payment Reduced From 10% to 5% in 1973.
11. Two Discounts Allowed per Year in 1973.
12. Extensions of New Pay Date From 15 to 20 Days in 1973.
13. Investigation of High Bill Complaints (Cut-Off Procedures Delayed) 33,000
14. Economic Impact of Increased Bad Debt Expense is Greatest on Low or Fixed Income Customers.
15. Actual Bad Debt Expense:
    1970—$259,566
    1971— 285,222
    1972— 294,017
    1973— 498,030
    1974— 334,330 (First Six Months)